80-1195

IN THE SUPREME COURT OF THE
UNITED STATES

GLENN H. SEWELL, Petitioner, vs. PHILLIPS PETROLEUM COMPANY, a Delaware corporation, Respondent.	)	No._____

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO, OR FOR AN ORDER REQUIRING
EN BANC REVIEW BY, THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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STATEMENT OF THE CASE

Respondent, Phillips Petroleum Company, a petroleum producer, entered into a contract with one Eckman for installation of an underground gasoline tank at a service station. Petitioner, Glenn H. Sewell, an employee of Eckman, was working in the excavation

when a cave-in occurred, causing injuries for which this action was brought. The sides of the excavation had not been sloped as required by local law. The legal question on which the case turned, was whether the delict of the contractor, in failing to comply with applicable standards, was imputable to the respondent (owner).

This is the second petition for certiorari filed by petitioner in this Court in this same action. Following the order of denial of the first petition on February 19, 1980, petitioner Sewell filed a "Motion For Relief and Issuance of Writ of Review By The Court En Banc," with the Court of Appeals. In that motion, petitioner requested that the Court of Appeals hold an en banc review of the District Court record and reverse its earlier decisions. Petitioner cited Rule 60(b)(3), Federal Rules of Civil Procedure, and 28 USC §1651(a)(b) as the basis for the motion. The motion was denied September 10, 1980, and the present petition followed.

ARGUMENT

Nothing has happened in this case since the original petition for writ of certiorari was denied approximately one year ago, except that an untimely

motion seeking reconsideration was made before the Court of Appeals and was denied. The second petition is nothing more than a restatement of the first petition, supported by the same arguments.

In respondent's brief opposing the original petition for writ of certiorari, respondent argued that the original petition did not comply with Rules 19(1)(b) and 23(4), Rules of the Supreme Court of the United States, because it failed to raise any considerations governing review on certiorari and failed to present with accuracy, brevity, and clearness what was necessary for an understanding of the points which were raised. These deficiencies have not been remedied in the petition currently pending.

The alternative petition seeking the issuance of a writ under 28 USC §1651(a) requiring the Appellate Court to grant Petitioner an en banc hearing does not comply with the procedure on application for extraordinary writs outlined in Rule 31, Rules of the Supreme Court of The United States. The alternative petition should also be denied.

CONCLUSION

No new factors have been added to the case since the first petition for writ of certiorari was denied. The second petition for certiorari should also be denied. The petition seeking an extraordinary writ does not comply with the Rules of the Supreme Court of The United States and should be denied.

Respectfully submitted this 6th day of February, 1981.

CHRISTENSEN, JENSEN
& POWELL

By _____
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Chris Wangsgard
Attorney for Respondent

CERTIFICATE OF SERVICE

This is to certify that on this 6th day of February, 1981, two copies of the foregoing Respondent's Brief in Opposition to Petition for a Writ of Certiorari to, or for an Order Requiring En Banc Review by, The United States Court of Appeals for the Tenth Circuit, was mailed, postage prepaid, to:

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